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August 30, 1995

William F. Caton, Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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AUG 30 1995

Re: MM Docket No. 93-136  
FM Table of Allotments  
Clewiston, Fort Myers Villas,  
Indiantown, Jupiter, Key Colony Beach,  
Key Largo, Marathon, and Naples, Florida

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Enclosed herewith for filing, on behalf of our client, Palm Beach Radio Broadcasting, Inc., are an original and four (4) copies of its "REPLY TO OPPOSITION TO APPLICATION FOR REVIEW" in the above-referenced proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,

*Howard J. Braun*

Howard J. Braun  
Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

AUG 30 1995

FEDERAL BUREAU OF INVESTIGATION  
OF THE FBI

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 93-136  
Table of Allotments, )  
FM Broadcast Stations ) RM-8161  
(Clewiston, Fort Myers Villas, ) RM-8309  
Indiantown, Jupiter, Key Colony ) RM-8310  
Beach, Key Largo, Marathon and )  
Naples, Florida) )

DOCKET FILE COPY ORIGINAL

TO: The Commission

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

**PALM BEACH RADIO BROADCASTING, INC.** ("Palm Beach"), licensee of Station WPBZ(FM), Indiantown, Florida, by its attorneys, pursuant to §1.115(d) of the Commission's Rules, hereby replies to the August 15, 1995 "Opposition to Application for Review" ("Opposition"), filed by Spanish Broadcasting System of Florida, Inc. ("SBSF") in this proceeding. As Palm Beach will now demonstrate, the Opposition falls woefully short of rebutting the two major arguments raised in the Application for Review to the subject Memorandum Opinion and Order, 10 FCC Rcd 6548 (Mass Media Bur. 1995) ("MO&O").<sup>1</sup>

**I. The Joint Counterproposal Was Substantially Complete  
As Filed And Supplemented And Should Not Have Been Dismissed**

1. The Application for Review clearly showed that the MO&O erred in dismissing the Joint Counterproposal as procedurally deficient, because the Counterproposal

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<sup>1</sup> The original Application for Review was filed by Palm Beach, WSUV, Inc. ("WSUV"), and GGG Broadcasting, Inc. ("GGG") as "Joint Petitioners". Counsel for WSUV and GGG has withdrawn from this proceeding, and this pleading is being filed on behalf of Palm Beach alone. In accordance with Commission rule and precedent, the absence of a separate or joint Reply by WSUV or GGG should not be construed as an admission of any fact or argument contained in the Opposition. Cf. §73.3584(b) of the Rules.

was substantially complete at the time of filing and was timely supplemented to supply an unintentionally omitted reimbursement pledge. Obviously recognizing this fact, the Opposition erroneously attempts to impose a "letter perfect" standard for completeness of FM rulemaking counterproposals. Thus, while it correctly concedes that the proper standard for completeness is "substantially complete at the time of filing," citing Fort Bragg, California, 6 FCC Rcd 5817 (Mass Media Bur. 1991), the Opposition paradoxically asserts that the Joint Counterproposal somehow was not substantially complete. Significantly, the Opposition's logic fails because none of the cases upon which SBSF relies<sup>2</sup> involves a partially complete reimbursement pledge, as in the instant case. Instead, they all involve a total absence of reimbursement commitments, which is not present in this case.

2. Specifically, the original Joint Counterproposal here contained the Joint Petitioners' commitment to reimburse the frequency change expenses of Station WAFC(FM), Clewiston, Florida, but inadvertently did not include a similar reimbursement statement for Sterling Communications Corporation ("Sterling"), licensee of Station WSGL(FM), Naples, Florida. This ministerial error, however, was fully cured in the Joint Petitioners' timely-filed August 23, 1993 Reply Comments. Under the unique facts of this case, it is clear that providing one of two required reimbursement statements constituted "substantial" completeness for the original Joint Counterproposal; otherwise, what the Opposition and the MO&O would demand amounts to 100% completeness, or a "letter perfect" standard, which manifestly is not the law. Fort Bragg, California, supra.

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<sup>2</sup> York, Alabama, 4 FCC Rcd 6923 (Mass Media Bur. 1989); Augusta, Kansas, 6 FCC Rcd 2043 (Mass Media Bur. 1991); Lonoke, Arkansas, 6 FCC Rcd 4861 (Mass Media Bur. 1991), Mary Esther, Appalachicola, and Crawfordville, Florida, 7 FCC Rcd 1417 (Mass Media Bur. 1992).

3. The error of the Opposition and the MO&O is compounded by their refusal to treat the Joint Petitioners' curative Reply Comment reimbursement statement as timely, despite the holding in Mary Esther, Appalachicola, and Crawfordville, Florida, supra, 7 FCC Rcd at 1417 (emphasis added), that "the counterproposal and the record" must be examined when determining whether a counterproposal is deficient. Moreover, in Clintonville, Wisconsin, 4 FCC Rcd 8462 (Mass Media Bur. 1989), a rulemaking petitioner was permitted to supplement its petition with a reimbursement statement, and in Caldwell, Texas, 10 FCC Rcd 7285 (Mass Media Bur. 1995), the Commission staff accepted, over opposition, a late engineering supplement to a proponent's counterproposal reply comments. The Opposition vainly tries to distinguish these precedents from the instant case but cites no support for its mistaken view that the Joint Petitioners should be held to a higher standard of completeness for their Joint Counterproposal than were the proponents in the cited cases. Similar situations must not be treated in a dissimilar fashion. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Therefore, the line of precedent cited above compels the legal conclusion that the Joint Counterproposal was not defective.

4. Finally, the Opposition maintains that SBSF will be "prejudiced" if the Joint Counterproposal is allowed to be perfected, and erroneously claims that supplementation should not be allowed if "any" party to the proceeding will be prejudiced. Of course, in a very broad sense, SBSF will be "prejudiced" if its rulemaking proposal faces competition from the Joint Counterproposal, instead of being unopposed; however, it is hornbook law that "No applicant has a vested interest in the disqualification of a competing applicant." See Azalea Corp., 31 FCC 2d 561, 563 (1971). Hence, SBSF's private interest "prejudice" should not be cognizable in this proceeding. In the instant case, it is Sterling's Station

WSGL(FM) -- not SBSF -- which really stood to be prejudiced in a public interest way by the apparent initial absence of a Commission-required commitment to reimburse Sterling for its frequency change expenses. Nevertheless, and most significantly, Sterling's August 23, 1993 Comments stated (at 2)(emphasis added): "Presumably, the Joint Proponents' omission ... was the result of oversight, and may be cured by a supplemental filing." If Sterling -- the station which might have gone uncompensated -- did not feel "offended" or "prejudiced" by the Joint Counterproposal's initial omission of a reimbursement statement and recognized the propriety of a supplemental filing, certainly SBSF should not be permitted to claim injury or prejudice on Sterling's behalf.

5. In sum, the MO&O violated the Joint Petitioners' administrative due process rights by dismissing the Joint Counterproposal as procedurally defective. Consequently, the Commission should reinstate the Joint Counterproposal and weigh it against SBSF's allotment proposal on the merits.

## **II. A Suitable WROC Transmitter Site Exists for Allotment Purposes**

6. The Opposition also tries to defend the MO&O's erroneous conclusion that the Joint Counterproposal failed to specify a suitable transmitter site for Station WROC(FM), Fort Myers Villas, Florida, for allotment purposes. However, it is well established that, in FM channel rulemaking proceedings, it is sufficient to specify a "theoretical site which meets the Commission's various technical rules". See West Palm Beach, Florida, 6 FCC Rcd 6975, 6976 (Mass Media Bur. 1991). The Joint Petitioners did just that for Station WROC and also provided the Allocations Branch with several possible locations for WROC's transmitter in Punta Rassa, Florida. However, the MO&O erroneously overlooked or failed to consider these alternative sites.

7. Lastly, the Opposition exaggerates the relevance of actual site information in allotment proceedings when it states (at 13) that the "actual availability of a potential transmitter site is a matter which can be raised in comments". More accurately, the Commission limits itself to taking into account "a showing...that, in reality, no theoretical sites exist...." West Palm Beach, Florida, supra, 6 FCC Rcd at 6976 (emphasis added). Here, SBSF did not make any showing that no theoretical sites exist. Hence, the Joint Petitioners' general showing of theoretical sites should suffice, id., and Palm Beach urges the Commission to reverse the MO&O's excessive site suitability concerns and specify reference coordinates in Punta Rassa for a theoretical WROC transmitter site which does not have the environmental impediments described in the MO&O.

WHEREFORE, in light of the foregoing, Palm Beach respectfully asks the Commission to grant review of the MO&O and to amend the FM Table of Allotments in accordance with the Joint Counterproposal.

Respectfully submitted,

**PALM BEACH RADIO BROADCASTING, INC.**

By 

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Its Attorneys

Dated: August 30, 1995

**CERTIFICATE OF SERVICE**

I, Debra A. Williams, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 30th day of August, 1995, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**" to the following:

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**\*BY HAND**